

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NICHOLAS EDDARDS,

Defendant.

Case No. 2:19-cr-00289-JAD-NJK

REPORT AND RECOMMENDATION

(Docket No. 39)

This matter was referred to the undersigned Magistrate Judge on Defendant Nicholas Eddards' motion to suppress evidence. Docket No. 39. The Court has considered Defendant's motion and exhibits, the United States' response and exhibits, Defendant's reply, and the evidence and arguments presented at an evidentiary hearing held before the Court. Docket Nos. 39, 40, 43, 44, 45, 55, 57, 58.

I. BACKGROUND

A. Testimony of Officer Pappas¹

On July 3, 2019, Las Vegas Metropolitan Police Department ("LVMPD") Officer Julien Pappas was assigned to gang enforcement, conducting proactive enforcement in Las Vegas, Nevada. Hearing Tr. (9/11/2020) at 1:55 p.m.² Officer Pappas was in uniform wearing a body

¹ Officer Pappas is now a Detective. Since he was an officer at the time the events in the instant case occurred, however, the Court refers to him herein as Officer Pappas.

² Citations to the recording of the hearing are noted by "Hearing Tr." followed by the relevant date and time of the hearing.

1 camera, driving a marked police vehicle along with his partner, LVMPD Officer Edgar Nahum.
2 Hearing Tr. (9/11/2020) at 1:55 p.m. Around 1:00 or 2:00 p.m., the officers came into contact
3 with Defendant, who was driving a 4-door KIA vehicle in the area of Western and Oakey in Las
4 Vegas, Nevada. Hearing Tr. (9/11/2020) at 1:56 p.m., 1:57 p.m., 3:19 p.m. Officer Pappas’
5 vehicle passed Defendant’s vehicle, which he thought was a rental car, so his attention was drawn
6 to the vehicle because there had been a recent rash of crimes being committed involving rental
7 cars. Hearing Tr. (9/11/2020) at 3:20 p.m. Officer Pappas noticed, as he passed by the car, that
8 Defendant was “very aware of the presence” of a marked police vehicle and had a “deer in the
9 headlights” look on his face. Hearing Tr. (9/11/2020) at 3:20 - 3:21 p.m. As a result of these
10 circumstances, Officer Pappas turned his vehicle around and drove behind Defendant’s vehicle.
11 Hearing Tr. (9/11/2020) at 3:21 p.m. Officer Pappas initiated a stop of the vehicle after it failed
12 to fully stop at a stop sign in front of the officers’ vehicle at Western and Highland. Hearing Tr.
13 (9/11/2020) at 1:57 – 1:58 p.m., 3:22 p.m.³

14 After Officer Pappas turned on his lights and siren to initiate the stop of Defendant’s
15 vehicle, Defendant’s vehicle turned onto a side street, made two more turns, and then turned into
16 the parking lot of the Artisan Hotel and drove almost to the valet before stopping. Hearing Tr.
17 (9/11/2020) at 1:55 p.m. Defendant’s failure to immediately made Officer Pappas concerned for
18 officer safety and, in his experience, people who fail to immediately pull over after an officer
19 initiates a vehicle stop may be trying to conceal or hide something, or preparing to flee. Hearing
20 Tr. (9/11/2020) at 1:59 p.m.

21
22 ³ Officer Pappas did not cite Defendant for failing to fully stop at the stop sign because he
23 thought it is unfair to “stack” offenses against him and also felt that Defendant had enough to deal
with because of his arrest. Hearing Tr. (9/11/2020) at 3:22 p.m.

1 When Defendant's vehicle stopped, Officer Pappas made his initial approach on the
2 driver's side of the vehicle. Hearing Tr. (9/11/2020) at 1:59 – 2:00 p.m. As he approached, he
3 could see Defendant's head moving inside the vehicle. Hearing Tr. (9/11/2020) at 2:00 p.m.
4 Further, rather than rolling his window down, Defendant opened his door, turned his head around,
5 and watched Officer Pappas walk toward him. Hearing Tr. (9/11/2020) at 2:00 p.m., 2:34 p.m.
6 This action caused suspicion for Officer Pappas – it appeared to him that Defendant was very
7 concerned about the officer's specific location as he approached. Hearing Tr. (9/11/2020) at 2:00
8 – 2:01 p.m. When Officer Pappas arrived at the vehicle, he noted that the vehicle had two
9 occupants – Defendant was the driver and he had a passenger in the front seat, Justin Chester.
10 Hearing Tr. (9/11/2020) at 2:02 p.m. He also noticed that Defendant had a large face tattoo of the
11 Anaheim Angels logo. Hearing Tr. (9/11/2020) at 2:09 p.m., 2:32 – 2:33 p.m. Officer Pappas
12 knew from his gang training that, in the early 90s, a street gang in Las Vegas that was involved in
13 violent crimes used that logo. Hearing Tr. (9/11/2020) at 2:10 p.m. For safety purposes, Officer
14 Pappas explained who he was, gave the reason he stopped the vehicle, and asked if there were any
15 guns, bombs, or dead bodies in the vehicle. Hearing Tr. (9/11/2020) at 2:02 p.m. Defendant gave
16 Officer Pappas his identification and some papers for the vehicle, including a California
17 registration. Hearing Tr. (9/11/2020) at 2:02 – 2:03 p.m. Officer Pappas took the keys to the
18 vehicle while he went back to his vehicle to run the information because he has had people in the
19 past drive away while he was conducting record searches. Hearing Tr. (9/11/2020) at 2:03 p.m.

20 Officer Pappas returned to his vehicle to conduct a record search; however, his computer
21 terminal had an issue that did not allow him to run the search. Hearing Tr. (9/11/2020) at 2:04
22 p.m. As a result, he called into Records and found that there was a delay in getting into the system
23 because several officers also could not get access. Hearing Tr. (9/11/2020) at 2:04 p.m., 2:37 p.m.

1 While at his car, Officer Pappas also called for backup because he thought it would be safer to
2 have more officers present. Hearing Tr. (9/11/2020) at 2:04 p.m., 2:36 p.m. While Officer Pappas
3 waited for the records check, he was able to run Defendant's local criminal history and found that
4 he had a federal firearms charge and an assault with a deadly weapon conviction for which he was
5 a registered felon. Hearing Tr. (9/11/2020) at 2:05 p.m. The criminal history check also indicated
6 that the passenger, Chester, was a registered felon. Hearing Tr. (9/11/2020) at 2:05 p.m.

7 It took about five minutes for the records check results to return over the phone. Hearing
8 Tr. (9/11/2020) at 2:07 p.m. During this five-minute period, Officer Pappas' partner told him that
9 the occupants of the vehicle were moving around inside the vehicle and Officer Pappas could see
10 the occupants moving, heads bobbing, and the car itself moving and shaking. Hearing Tr.
11 (9/11/2020) at 2:07 – 2:08 p.m. Officer Pappas' partner told him that he was concerned about
12 safety as a result of the movements. Hearing Tr. (9/11/2020) at 2:04 p.m. The officers noted that
13 both occupants of the vehicle were nervous. Hearing Tr. (9/11/2020) at 2:35 – 2:36 p.m. When
14 the officers received the results of the record check, they learned that the plate on the Kia vehicle
15 that Defendant was driving returned to a Hyundai, though the registration and the VIN matched.
16 Hearing Tr. (9/11/2020) at 2:07 p.m., 3:23 – 3:24 p.m. The car was registered to a rental company.
17 Hearing Tr. (9/11/2020) at 3:24 p.m. Officer Pappas described a "cold-plated vehicle" as a vehicle
18 with a plate on it that is not registered to that car, which is often done in an effort to avoid detection
19 by law enforcement. Hearing Tr. (9/11/2020) at 1:51 - 1:52 p.m. The officers determined that the
20 safest option was to pull the occupants of the vehicle out and talk to them. Hearing Tr. (9/11/2020)
21 at 2:07 p.m., 2:09 p.m., 2:36 p.m., 2:39 p.m.

22 Officer Pappas reapproached the vehicle, asked Defendant to exit the vehicle, and walked
23 him to the front of the patrol car. Hearing Tr. (9/11/2020) at 2:11 – 2:12 p.m. Since Officer Pappas

1 and his partner noticed that Defendant and his passenger had been moving around “a lot” in the
2 vehicle and learned that the vehicle was cold-plated, Officer Pappas handcuffed Defendant for
3 safety purposes and advised him that he was not under arrest but was being detained while officers
4 determined what had happened with the vehicle. Hearing Tr. (9/11/2020) at 2:12 p.m., 3:23 p.m.,
5 3:24 – 3:25 p.m., 3:36 p.m.

6 Officer Pappas conducted a pat-down of Defendant for weapons. Hearing Tr. (9/11/2020)
7 at 2:12 p.m. Defendant’s waistband was covered by a shirt and, as Officer Pappas patted him
8 down, he felt what he immediately believed to be a holster in Defendant’s right front appendix.
9 Hearing Tr. (9/11/2020) at 2:12 – 2:13 p.m., 2:21 p.m., 2:55 p.m., 3:31 p.m., 3:58 p.m. Officer
10 Pappas did not manipulate the object with his fingers or try to manipulate it in any other way – he
11 used only his palm during the pat-down. Hearing Tr. (9/11/2020) at 2:43 p.m. Officer Pappas
12 asked Defendant what was in his pants. Hearing Tr. (9/11/2020) at 2:40 p.m., 2:43 p.m., 3:36 p.m.,
13 4:00 p.m., 4:05 p.m. Although the officer knew that the object – from placement and feel – was a
14 holster, he asked Defendant what it was to give him an opportunity to be honest with him. Hearing
15 Tr. (9/11/2020) at 2:43 – 2:44 p.m., 4:02 p.m. Instead, Defendant first said it was a belt buckle
16 and then he said it was a wallet. Hearing Tr. (9/11/2020) at 2:12 p.m., 2:41 – 2:42 p.m., 2:44 p.m.,
17 3:36 p.m. Officer Pappas said the object was a holster and Defendant said it was not a holster.
18 Hearing Tr. (9/11/2020) at 2:41 p.m., 3:36 p.m. Defendant reached around and pulled his shirt up,
19 causing Officer Pappas to be able to see what he believed was a holster. Hearing Tr. (9/11/2020)
20 at 2:13 p.m., 2:45 p.m., 3:34 p.m., 4:01 p.m., 4:07 p.m.

21 Officer Nahum’s bodycam video shows Defendant pulling his shirt up while Officer
22 Pappas’ right hand is by his side and his left hand is holding Defendant’s handcuffs. Hearing Tr.
23 (9/11/2020) at 2:47 – 2:48 p.m., 3:49 p.m., 4:04 – 4:05 p.m. Officer Pappas was not putting any

1 pressure on the handcuffs since Defendant was being cooperative; rather, he was allowing
2 Defendant to move freely, but keeping his hand on the handcuffs in case Defendant became
3 uncooperative and he needed to restrain him. Hearing Tr. (9/11/2020) at 3:49 – 3:50 p.m.

4 Officer Pappas owned firearms before he became a police officer and continues to own
5 them as a police officer. Hearing Tr. (9/11/2020) at 3:31 p.m., 3:50 p.m. He carries a firearm
6 while on duty and he carries a firearm while off duty. Hearing Tr. (9/11/2020) at 3:50 p.m.
7 Further, Officer Pappas has participated in “hundreds” of gun-related arrests. Hearing Tr.
8 (9/11/2020) at 1:50 p.m. Officer Pappas has worn a concealed firearm every day since he has been
9 a police officer and is familiar with how firearms are concealed and holstered on a person. Hearing
10 Tr. (9/11/2020) at 1:52 p.m. Statistically, the front right appendix is the place where most right-
11 handed people carry concealed firearms, and that area is where Officer Pappas has “usually”
12 located concealed firearms. Hearing Tr. (9/11/2020) at 1:52 p.m., 1:53 p.m. Further, Officer
13 Pappas has seen makeshift methods of carrying concealed firearms, including SCUBA gear
14 tailored with duct tape to make a holster. Hearing Tr. (9/11/2020) at 1:53 – 1:54 p.m.

15 Officer Pappas carries an IWB, or an inside the waistband holster, which is the easiest and
16 most comfortable way to carry a concealed firearm and also offers the quickest access to the
17 firearm. Hearing Tr. (9/11/2020) at 1:54 p.m. An IWB is usually made of leather or kydex (a type
18 of plastic), is bottomless, and has a clip to clip to the user’s clothing or belt. Hearing Tr.
19 (9/11/2020) at 1:54 – 1:55 p.m. IWB holsters are generally clipped to the beltline, providing
20 immediate access to the wearer. Hearing Tr. (9/11/2020) at 1:55 p.m. Higher-end holsters are
21 generally molded in the shape of the firearm that they are supposed to carry. Hearing Tr.
22 (9/11/2020) at 3:59 p.m. If the De Walt holster that Officer Pappas recovered from Defendant had
23 been used to carry a firearm on a regular basis, it should have had an imprint of a firearm, which

1 might be able to be seen with the naked eye. Hearing Tr. (9/11/2020) at 3:59 – 4:00 p.m. Officer
2 Pappas did not see a firearm imprint on the holster, but he did see some defects in it. Hearing Tr.
3 (9/11/2020) at 4:00 p.m.

4 When Defendant pulled his shirt up, Officer Pappas saw a metal clip holding a leather
5 holster in Defendant's pants. Hearing Tr. (9/11/2020) at 2:14 p.m., 2:46 p.m. Defendant dropped
6 his shirt back down and Officer Pappas pulled Defendant's shirt back up, removed the De Walt
7 brand holster, and put it on the hood of his patrol car, while saying that it was a holster. Hearing
8 Tr. (9/11/2020) at 2:14 p.m., 2:46 p.m., 4:06 p.m. Defendant continued to say that the item was
9 not a holster. Hearing Tr. (9/11/2020) at 2:14 p.m. Nonetheless, Officer Pappas was convinced
10 that the item he removed from Defendant's waistband was an IWB holster – it had all the
11 characteristics of the IWB holster that Officer Pappas himself carries every day. Hearing Tr.
12 (9/11/2020) at 2:20 p.m.

13 After finding the holster, Officer Pappas ran a more complete criminal history of the
14 occupants of the vehicle to confirm that they were prohibited from possessing firearms. Hearing
15 Tr. (9/11/2020) at 2:19 p.m. Officer Pappas applied to Judge Tobiasson in state court for a
16 telephonic search warrant to search the vehicle and noted the criminal history in the search warrant
17 affidavit. Hearing Tr. (9/11/2020) at 2:19 p.m., 3:43 p.m., 3:46 p.m. In the affidavit, Officer
18 Pappas described the holster as an IWB holster capable of holding a firearm. Hearing Tr.
19 (9/11/2020) at 2:21 p.m. Officer Pappas described finding the holster during a pat-down in the
20 front right appendix area and also described Defendant lifting his shirt up so Officer Pappas could
21 see the IWB holster in his waistband. Hearing Tr. (9/11/2020) at 2:22 p.m., 3:47 p.m. As a result
22 of his affidavit, Officer Pappas obtained a search warrant to search the vehicle that Defendant had
23 been driving, and to obtain buccal swabs from both Defendant and his passenger. Hearing Tr.

(9/11/2020) at 2:22 p.m. During the search of the vehicle, Officers recovered a black Glock 19 firearm in the glove box and a nickel-plated Kahr Arms subcompact firearm with a 12-round magazine and a laser attached to the trigger guard behind the glove box. Hearing Tr. (9/11/2020) at 2:22 – 2:23 p.m. DNA was found on the Kahr Arms magazine that was consistent with Defendant’s DNA. Hearing Tr. (9/11/2020) at 2:23 p.m., 2:30 p.m. The Kahr Arms firearm is of a size that it would fit into the holster recovered from Defendant. Hearing Tr. (9/11/2020) at 3:04 p.m.

B. Testimony of Officer Nahum

On July 3, 2019, LVMPD Police Officer Edgar Nahum was on duty with his partner Officer Pappas. Hearing Tr. (9/11/2020) at 4:10 p.m. The two officers arrested Defendant and Justin Chester on that day. Hearing Tr. (9/11/2020) at 4:11 p.m. After stopping and initially approaching Defendant’s vehicle, the officers returned to their patrol vehicle to conduct a records check. Hearing Tr. (9/11/2020) at 4:11 p.m. During that time, Officer Nahum observed so much movement in Defendant’s vehicle that the vehicle was shaking. Hearing Tr. (9/11/2020) at 4:12 p.m. Officer Nahum could see the vehicle’s occupants’ heads bobbing around inside the vehicle. Hearing Tr. (9/11/2020) at 4:12 p.m. Officer Nahum also observed Chester reaching near the center console of the vehicle and alerted his partner that the occupants of the vehicle were moving around. Hearing Tr. (9/11/2020) at 4:13 p.m.

II. ANALYSIS

A. Credibility of Witnesses

The Court ordered an evidentiary hearing in order to make an accurate determination of what occurred in the instant case and how the facts relate to the applicable caselaw. “The longstanding and repeated invocations in caselaw of the need of district courts to hear live

1 testimony so as to further the accuracy and integrity of the factfinding process are not mere
2 platitudes. Rather, live testimony is the bedrock of the search for truth in our judicial system.”
3 *United States v. Thoms*, 684 F.3d 893, 903 (9th Cir. 2012). “[J]udges simply cannot decide
4 whether a witness is telling the truth on the basis of a paper record and must observe the witnesses’
5 demeanor to best ascertain their veracity - or lack thereof.” *Oshodi v. Holder*, 729 F.3d 883, 892
6 (9th Cir. 2013) (internal citation omitted). *See also United States v. Howell*, 231 F.3d 615, 621
7 (9th Cir. 2000) (evidentiary hearing required where defendant demonstrates that a significant
8 disputed factual issue exists); *United States v. Mejia*, 69 F.3d 309, 315 (9th Cir. 1995) (“There can
9 be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness’s
10 credibility”).

11 During the evidentiary hearing in this matter, the Court had the opportunity to listen to the
12 testimony of all witnesses, to observe and evaluate each witness’ demeanor while testifying, and
13 to weigh each witness’ credibility. Having done so, the Court finds that both officers testified
14 credibly.

15 **B. Motion to Suppress**

16 Defendant asks the Court to suppress the evidence seized from him and all evidence
17 subsequently discovered as a result of that seizure. Docket No. 39. Specifically, Defendant
18 submits that he was subjected to a *Terry* pat-down absent any articulable suspicion that he was
19 armed or dangerous. *Id.* at 7-10. Defendant further submits that Officer Pappas’ pat-down
20 exceeded the scope of a permissible *Terry* pat-down when he retrieved the holster from underneath
21 Defendant’s shirt. *Id.* at 10-12. Finally, Defendant submits that Officer Pappas impermissibly lied
22 in obtaining the warrant to search the vehicle. *Id.* at 12-15. Defendant submits that these violations
23 to his rights resulted in the ability to search the vehicle; therefore, he asks the Court to suppress all

1 of the evidence found in the search of the vehicle. *Id.* at 2. Lastly, Defendant submits that the
2 inevitable discovery exception does not apply in the instant case because the vehicle would not
3 have been impounded and, alternatively, the officers could have turned the car over to its owner
4 (Hertz). *Id.* at 15.

5 In response, the United States submits that the officers' conduct leading to the search
6 warrant and arrest of Defendant was "well within the boundaries of the Fourth Amendment."
7 Docket No. 43 at 6. The United States submits that Officer Pappas had reasonable suspicion that
8 Defendant was armed and dangerous because, *inter alia*, Defendant attempted to leave his vehicle,
9 is a member of a violent gang, and made furtive movements in his vehicle while the officers ran
10 the records check. *Id.* at 8-9. The United States further submits that the scope of the *Terry* pat-
11 down was proper because Officer Pappas immediately knew the object was a holster and
12 Defendant lifted his own shirt. *Id.* at 14. Additionally, the United States submits that Officer
13 Pappas' representations in obtaining the warrant were accurate and, even if not, the mistakes were
14 *de minimis*. *Id.* at 14-17. Finally, the United States submits that, in any event, both the automobile
15 exception and the inevitable discovery exception apply. *Id.* at 17-19.

16 In reply, Defendant primarily argues against the government's characterization of the
17 events at issue. *See* Docket No. 45.

18 **1. *Terry* Pat-down**

19 "The Fourth Amendment permits brief investigative stops ... when a law enforcement
20 officer has a particularized and objective basis for suspecting the particular person stopped of
21 criminal activity." *Navarette v. California*, 134 S.Ct. 1683, 1687 (2014) (internal quotation marks
22 omitted). An investigatory detention, a brief seizure by police based on reasonable suspicion of
23 criminal activity, is a "narrowly drawn exception to the probable cause requirement of the Fourth

1 Amendment.” *Terry v. Ohio*, 392 U.S. 1, 26 (1968). *See also United States v. Valdes-Vega*, 738
2 F.3d 1074, 1078 (9th Cir. 2013) (*en banc*) (Fourth Amendment permits investigatory stops when
3 law enforcement officers have “reasonable suspicion” that criminal activity “may be afoot”)
4 (internal quotation marks omitted). “[R]easonable suspicion exists when an officer is aware of
5 specific, articulable facts which, when considered with objective and reasonable inferences, form
6 a basis for particularized suspicion.” *United States v. Montero-Camargo*, 208 F.3d 1122, 1129
7 (9th Cir. 2000) (*en banc*).

8 The police may stop an individual reasonably suspected of criminal activity, question him
9 briefly, and perform a limited pat-down frisk for weapons. *Terry*, 392 U.S. at 22-24. “Although
10 a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is
11 considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously
12 less than is necessary for probable cause.” *Id.* at 21 (citations and internal quotation marks
13 omitted). “In assessing whether a detention is too long in duration to be justified as an investigative
14 stop,” it is proper “to examine whether the police diligently pursued a means of investigation that
15 was likely to confirm or dispel their suspicions quickly.” *United States v. Sharpe*, 470 U.S. 675,
16 686 (1985). Ultimately, the analysis remains one of reasonableness, and thus the court must
17 examine the “totality of the circumstances” surrounding the stop to determine whether the length
18 is reasonable. *See United States v. Turvin*, 517 F.3d 1097, 1101 (9th Cir. 2008). Reasonable
19 suspicion “is dependent upon both the content of information possessed by police and its degree
20 of reliability.” *United States v. Edwards*, 761 F.3d 977, 983 (9th Cir. 2014) (internal citation
21 omitted).

22 Determining reasonable suspicion requires considering the totality of the circumstances,
23 and “all relevant factors must be considered in the reasonable suspicion calculus-even those factors

1 that, in a different context, might be entirely innocuous.” *United States v. Fernandez-Castillo*, 324
2 F.3d 1114, 1117 (9th Cir. 2003) (quoting *United States v. Arvizu*, 534 U.S. 266, 277-78 (2002)).
3 Reasonable suspicion may depend on an officer’s personal experience and special training to make
4 inferences and deductions, as long as the conclusions are reasonable. *United States v. Montero-*
5 *Camargo*, 208 F.3d 1122, 1131 (9th Cir. 2000) (internal citation omitted). *See also Lopez-Soto*,
6 205 F.3d at 1105 (quoting *United States v. Michael R.*, 90 F.3d 340, 346 (9th Cir. 1996)) (police
7 officer “is entitled to rely on his training and experience in drawing inferences from the facts he
8 observes, but those inferences must also ‘be grounded in objective facts and be capable of rational
9 explanation’”).

10 When considering the totality of the circumstances, courts must keep in mind that
11 reasonable suspicion is a “commonsense, nontechnical conception[] that deal[s] with ‘the factual
12 and practical considerations of everyday life on which reasonable and prudent men, not legal
13 technicians, act.’” *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (quoting *Illinois v. Gates*,
14 462 U.S. 213, 231 (1983). Reasonable suspicion may not be based on “broad profiles,” “overbroad
15 generalizations,” or “a prefabricated or recycled profile of suspicious behavior[.]” *United States*
16 *v. Sigmond-Ballesteros*, 285 F.3d 1117, 1121, 1124, 1126 (9th Cir. 2002) (internal quotation marks
17 omitted). However, a stop may be founded on reasonable suspicion despite a possible innocent
18 explanation for every police observation. *United States v. Tiong*, 224 F.3d 1136, 1140 (9th Cir.
19 2000). Moreover, given that the standard for reasonable suspicion is “a particularized and
20 objective basis for suspecting the person stopped of criminal activity[.]” the “quantum of proof
21 needed for reasonable suspicion is less than a preponderance of evidence, and less than probable
22 cause.” *Id.* (internal quotation marks omitted).

1 Temporarily handcuffing Defendant does not make the *Terry* frisk automatically invalid
2 because a permissible *Terry* frisk takes place when an officer suspects the Defendant is dangerous.
3 *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1983) (“A brief but complete restriction
4 of liberty, if not excessive under the circumstances, is permissible during a *Terry* stop and does
5 not necessarily convert the stop into an arrest.”). Indeed, it stands to reason that the issue of
6 whether Defendant was permissibly handcuffed prior to the pat-down collapses into whether the
7 officer reasonably believed the individual was armed and dangerous (and therefore justified in
8 conducting a *Terry* frisk). *See, e.g., United States v. Kinsey*, 952 F. Supp. 2d 970, 973 (E.D. Wash.
9 2013).

10 The court must, therefore, determine whether Defendant’s investigatory detention was
11 based on reasonable suspicion. Whether a person has been seized for purposes of the Fourth
12 Amendment is a mixed question of law and fact. *United States v. Kim*, 25 F.3d 1426, 1430 (9th
13 Cir. 1994). The Ninth Circuit defines “reasonable suspicion” as “specific, articulable facts which,
14 together with objective and reasonable inferences, form the basis for suspecting that the particular
15 person detained is engaged in criminal activity.” *United States v. Rojas-Millan*, 234 F.3d 464,
16 468-69 (9th Cir. 2000) (quoting *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000)).
17 If an officer does not have reasonable suspicion, and the stop therefore violates the Fourth
18 Amendment, any evidence obtained as a result of the stop must be suppressed as fruit of the
19 poisonous tree. *United States v. Thomas*, 211 F.3d 1186, 1192 (9th Cir. 2000) (citing *Wong Sun*
20 *v. United States*, 371 U.S. 471, 484-85 (1963)).

21 In looking at the totality of the circumstances, the Court finds that specific, articulable
22 facts, together with objective and reasonable inferences, existed to give rise to reasonable
23 suspicion. Officer Pappas first noticed Defendant looking at him with a “deer in the headlights

1 look” as the cars drove past each other. Defendant then failed to fully stop at a stop sign. When
2 Officer Pappas attempted to pull the vehicle over, Defendant drove past at least one area where he
3 could have stopped before he eventually stopped the vehicle. When Officer Pappas approached
4 the vehicle on foot, Defendant had opened his door and was watching the officer approach. Officer
5 Pappas noticed a tattoo on Defendant’s face that was consistent with gang membership. While
6 Officer Pappas conducted a records check, Defendant and his passenger made furtive movements
7 in their vehicle, to the extent that the vehicle moved and/or shook. Officer Pappas learned that the
8 vehicle was cold-plated and that both Defendant and his passenger had felony convictions.
9 Clearly, in examining the totality of the circumstances and including the officer’s training and
10 experience, reasonable suspicion existed. *See United States v. Burkett*, 612 F.3d 1103 (9th Cir.
11 2010). The Court therefore finds that the *Terry* pat-down was appropriate.

12 **2. Scope of *Terry* Pat-down**

13 To pass constitutional muster, a *Terry* frisk must be “carefully limited [to] . . . the outer
14 clothing . . . in an attempt to discover weapons which might be used to assault” an officer. *Terry*,
15 392 U.S. at 20, 29-30. Because a *Terry* frisk is limited to the individual’s outer clothing, the scope
16 of the search is proper only if any incriminating evidence was immediately apparent during the
17 pat-down. *See United States v. I.E.V.*, 705 F.3d 430, 440 (9th Cir. 2012). Therefore, if
18 incriminating evidence is only uncovered as a result of a more intrusive search, the scope is
19 improper, and the uncovered evidence is subject to the exclusionary rule. *See, e.g., id.* at 440-42.
20 The burden falls on the government to demonstrate that the scope of the *Terry* frisk was proper.
21 *See id.* at 440 (“The [g]overnment bears the burden of proving that the incriminating character of
22 an object was immediately identifiable . . .”).

1 Officer Pappas testified that he recognized the item on Defendant's waistband as a holster
2 immediately, based on his training and experience, without need to manipulate the item with his
3 fingers. Officer Pappas further testified that he asked Defendant what the item was in an effort to
4 give Defendant an opportunity to be honest with him. Defendant gave two different responses
5 about what the item was. Further, Officer Pappas testified that Defendant pulled his own shirt up,
6 allowing the officer to see the item, which confirmed to him that it was a holster.⁴ At that time,
7 Officer Pappas already knew that Defendant had a gun-related conviction and that he and his
8 passenger were making furtive movements in the vehicle. *See United States v. Spencer*, 1 F.3d
9 742, 746 (9th Cir. 1992) (police justified in believing a firearm might be in vehicle after
10 discovering a shoulder holster under defendant's jacket during Terry frisk and observing
11 defendant's furtive movements in vehicle).

12 The Court finds the officer's testimony, which was tested by cross-examination and
13 corroborated by his partner's bodycam footage showing the officer's hands at the moment
14 Defendant pulled his shirt up, credible.⁵ The Court therefore finds that Officer Pappas did not
15 exceed the scope of the *Terry* frisk.

16

17 _____
18 ⁴ The parties argue about whether Defendant initially pulled his shirt up or whether Officer
19 Pappas did so. In light of Officer Pappas' testimony that he recognized the item as a holster as
20 soon as he felt it, the Court finds that the issue of who pulled the shirt up is irrelevant to this
analysis. Nonetheless, the evidence on Officer Nahum's bodycam video demonstrates that
Defendant pulled his shirt up the first time.

21 ⁵ While the holster is made by DeWalt, a tool company, the Court finds that that fact does
22 not impact its decision. Officer Pappas testified that the holster was of the same size and shape as
23 the IWB holster he wears, that it was in a location on Defendant's body where people commonly
carry firearms, and that it could hold the firearm that was found to have Defendant's DNA on it.
Therefore, even if the holster was made to carry tools and not a firearm, Officer Pappas properly
recovered it from Defendant.

3. Search Warrant

Defendant submits that Officer Pappas lied in his search warrant affidavit about how he discovered the holster and what the holster actually is; therefore, he asks the Court to suppress the evidence recovered during the search of the vehicle. Docket No. 39 at 14.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court addressed at length whether a false statement by a government affiant invalidates a search warrant. *United States v. Hammett*, 236 F.3d 1054, 1058 (9th Cir. 2001) (citation omitted). The Court held that, under certain circumstances, a defendant is entitled to an evidentiary hearing to afford the defendant an opportunity to attack the veracity of a facially-valid affidavit used to support a search warrant. A defendant can challenge a facially valid affidavit by making a substantial preliminary showing that “(1) the affidavit contains intentionally or recklessly false statements or misleading omissions, and (2) the affidavit cannot support a finding of probable cause without the allegedly false information.” *United States v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000) (citing *United States v. Stanert*, 762 F.2d 775, 780-81 (9th Cir. 1985)).

Before a criminal defendant is entitled to go beneath the search warrant to obtain additional information concerning the police investigation and an informant, he or she is required to make a substantial threshold showing. A defendant’s preliminary showing cannot be “merely conclusory.” *Reeves*, 210 F.3d at 1044. “There must be allegations of deliberate falsehood or reckless disregard for the truth, and these allegations must be accompanied by an offer of proof.” *Hammett*, 236 F.3d at 1058 (*quoting Franks*, 438 U.S. at 171). “To justify a hearing, a defendant must make specific allegations, allege a deliberate falsehood or reckless disregard for the truth, and accompany such a claim with a detailed offer of proof.” *United States v. Craighead*, 539 F.3d 1073, 1080 (9th Cir. 2008) (citation omitted). The movant bears the burden of proof and must

1 make a substantial showing to support both elements. *See United States v. Garcia–Cruz*, 978 F.2d
2 537, 540 (9th Cir.1992).

3 Intentional or reckless omissions may provide grounds for a *Franks* hearing. *United States*
4 *v. Jawara*, 474 F.3d 565 (9th Cir. 2007)); *see also United States v. Stanert*, 762 F.2d 775, 781 (9th
5 Cir. 1985) (“By reporting less than the total story, an affiant can manipulate the inferences a
6 magistrate [judge] will draw. To allow a magistrate [judge] to be misled in such a manner could
7 denude the probable cause requirement of all real meaning”). Although “[c]lear proof of deliberate
8 or reckless omission is not required,” a “[d]efendant ‘must offer direct evidence of the affiant’s
9 state of mind or inferential evidence that the affiant had obvious reason for omitting facts in order
10 to prove a deliberate falsehood or reckless disregard.” *United States v. Souffront*, 338 F.3d 809,
11 822-23 (7th Cir. 2003). A defendant must also show that the “affidavit, once corrected and
12 supplemented,” would not “provide ... a substantial basis for concluding that probable cause
13 existed.” *Stanert*, 762 F.2d at 782. “[T]he omission rule does not require an affiant to provide
14 general information about every possible theory, no matter how unlikely, that would controvert
15 the affiant’s good-faith belief that probable cause existed for the search.” *Craighead* 539 F.3d at
16 1081.

17 Here, the Court need not determine whether Defendant made the substantial preliminary
18 showing necessary for a *Franks* hearing, as an evidentiary hearing occurred on this motion.⁶ The
19 Court has already found that Officer Pappas was truthful in his testimony at the evidentiary hearing
20 and, therefore, that he properly engaged in a *Terry* pat-down and recovered the holster from
21 Defendant. The Court has further found that, though the holster was made by a tool company,

22
23 ⁶ Nonetheless, the Court notes that Defendant failed to make the required offer of proof in
his motion. *See Craighead*, 539 F.3d at 1073.

1 Officer Pappas credibly testified that he has found items used as holsters that were not initially
2 made for such use and that, under the totality of the circumstances considering his training and
3 experience, Officer Pappas reasonably believed that the item he found was being used as a holster
4 for a firearm. Therefore, the Court now finds that Officer Pappas did not make intentionally or
5 recklessly false statements in his affidavit for a search warrant for the vehicle Defendant was
6 driving. As a result of this finding, the Court need not reach the issue of materiality, as Defendant's
7 *Franks* claim fails.⁷

8 **III. RECOMMENDATION**

9 Based on the foregoing and good cause appearing therefore,

10 IT IS RECOMMENDED that Defendant's motion to suppress evidence, Docket No. 39,
11 be **DENIED**.

12 DATED: October 21, 2020.

13
14 
NANCY J. KOPPE
15 UNITED STATES MAGISTRATE JUDGE

16 **NOTICE**

17 This report and recommendation is submitted to the United States District Judge
18 assigned to this case pursuant to 28 U.S.C. § 636(b)(1). A party who objects to this report and
19 recommendation must file a written objection supported by points and authorities within fourteen
20 days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file
21

22 _____
23 ⁷ The Court also need not address the parties' inevitable discovery and automobile exception arguments.

1 a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951
2 F.2d 1153, 1157 (9th Cir. 1991).